Re Aisha Zainab Mahmud-Fairbairn; ex p Ian Benjamin Fraser & Ors

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D2-29-1317 OF 1997
ABDUL AZIZ J
29 JANUARY 1999

Bankruptcy *— Notice — Application to set aside — Notice defective — Whether notice was defective to warrant tahat it be set aside*

A judgment ('the first judgment') obtained by the judgment creditors against the judgment debtor was entered on the wrong date; ie it should have been 30 December 1996 instead of 13 November 1996, but none of the parties noticed it. Consequently, the senior assistant registrar assessed the general damages awarded in the first judgment ('the second judgment'). On 9 June 1997, a bankruptcy notice was filed and served on the judgment debtor on 24 July 1997. On 4 September 1997, the judgment debtor filed an application for extension of time to apply for the setting aside of the judgments for the reason that the first judgment was irregular and that since the second judgment was based on the first judgment, the second judgment was irregular too. This prompted the judgment creditor to apply for amendment of the judgments. On 7 October 1997, the judgment debtor applied to set aside the bankruptcy notice on grounds that the judgments were irregular and that the amount for interest in the notice was excessive. The learned senior assistant registrar dismissed the application to set aside the bankruptcy notice and allowed the judgments to be amended. Hence the judgment debtor appealed and advanced two reasons: (i) the judgment creditor had not obtained a final judgment as stipulated by s 3(1)(i) of the Bankruptcy Act 1967; and (ii) the notice claimed an amount of interest that exceeded an amount actually due.

Held, dismissing the appeal:

(1) The second judgment was certainly a final judgment and not an interlocutory judgment. It was a final judgment because it disposed of the rights between the parties. The fact that it contained an error that required amendment did not render it any the less a final judgment (see p 648D); *Re Seah Kim Khoo George, ex p Mary Seah* [1989] 3 MLJ cxxvi distinguished.

(2) Proviso (ii) to s 3(2) of the Act provides that a bankruptcy notice 'shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake'. The time allowed should be within seven days after the date of service of the bankruptcy notice. No such notice was given (see p 648E–F).

A [**Bahasa Malaysia summary**

Suatu penghakiman ('penghakiman pertama') yang diperolehi oleh pemiutang penghakiman terhadap penghutang penghakiman telah dimasukkan pada tarikh yang salah; iaitu sepatutnya 30 Disember 1996 dan bukannya 13 November 1996, tetapi ini terlepas daripada B perhatian pihak-pihak. Berikutnya, penolong kanan pendaftar telah menaksir ganti rugi am yang diawardkan dalam penghakiman pertama ('penghakiman kedua'). Pada 9 Jun 1997, satu notis kebankrapan telah difailkan dan disampaikan kepada penghutang penghakiman pada 24 Julai 1997. Pada 4 September 1997, penghutang penghakiman memfailkan permohonan perlanjutan masa untuk C memohon pengetepian penghakiman-penghakiman tersebut atas alasan bahawa penghakiman pertama adalah luar aturan dan bahawa oleh kerana penghakiman kedua adalah berdasarkan penghakiman pertama, penghakiman kedua juga adalah luar aturan. Ini menyebabkan pemiutang penghakiman memohon pindaan kepada penghakiman-penghakiman tersebut. Pada 7 Oktober 1997, D penghutang penghakiman memohon untuk mengetepikan notis kebankrapan atas alasan-alasan bahawa penghakiman-penghakiman adalah luar aturan dan bahawa amaun untuk faedah dalam notis tersebut adalah melampau. Penolong kanan pendaftar telah menolak permohonan untuk mengetepikan notis kebankrapan dan E membenarkan penghakiman untuk dipinda. Justeru itu penghutang penghakiman merayu dan mengemukakan dua alasan: (i) pemiutang penghakiman tidak memperolehi penghakiman muktamad seperti yang ditetapkan oleh s 3(1)(i) Akta Kebankrapan 1967; dan (ii) notis menuntut amaun faedah yang melebihi amaun yang sebenarnya harus dibayar.

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Diputuskan, menolak rayuan:

(1) Penghakiman kedua sememangnya merupakan penghakiman muktamad dan bukannya penghakiman interlokutori. Ia adalah penghakiman muktamad kerana ia menyelesaikan hak-hak di G antara pihak-pihak. Hakikat bahawa ia mengandungi kesilapan yang memerlukan pindaan tidak menyebabkannya kurang sempurna daripada penghakiman muktamad (lihat ms 648D); *Re Seah Kim Khoo George, ex p Mary Seah* [1989] 3 MLJ cxxvi dibeza.

H (2) Proviso (ii) kepada s 3(2) Akta tersebut memperuntukkan bahawa suatu notis kebankrapan 'shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake'. Masa yang I dibenarkan haruslah dalam tempoh tujuh hari selepas tarikh penyampaian notis kebankrapan tersebut. Tiada notis sedemikian telah diberikan (lihat ms 648E–F).]

Notes

For cases on defective notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1718-1719.

Case referred to

Seah Kim Khoo George, Re; ex p Mary Seah [1989] 3 MLJ cxxvi (distd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i), (2)(ii)

Aneeta Kulasegaran (*Ranjit Thomas & Kula*) for the judgment creditors.
S Ragu (with *Ashok K Raman*) (*Abu Talib Shahrom & Zahari*) for the judgment debtor.

Cur Adv Vult

Abdul Aziz J: By this appeal, the judgment debtor seeks to have set aside a judgment notice served on her. The judgment notice was based on a judgment obtained by the judgment creditors against her and two others in Civil Suit No D3–22–638–96, where the judgment creditors were plaintiffs and the judgment debtor and the two others were defendants. The events leading to the judgment in that civil suit and to the issue of the bankruptcy notice are as follows.

On 21 December 1996, the plaintiffs' solicitors wrote to the defendants' solicitors giving them notice to file their statement of defence within seven days, otherwise the plaintiffs (the judgment creditors here) would enter judgment in default of defence.

On 30 December 1996, the plaintiffs' solicitors filed the judgment in default. By an innocent error, it bore the date 13 November instead of 30 December as the date of the judgment. The judgment was for a liquidated sum of RM318,641 as special damages, for general damages, for interest at 8% per annum from the date of judgment until full settlement, and for costs of RM225.

I shall refer to it as the first judgment. I should like to emphasize at the outset that it was a judgment actually entered on 30 December 1996 but wrongly stated as entered on 13 November 1996. There was in fact no judgment entered on 13 November 1996.

The first judgment was served on the defendants' solicitors on 21 January 1997.

On 22 April 1997, the learned senior assistant registrar assessed the general damages awarded in the first judgment at RM12,530,711. That sum, plus the sum of RM318,641 in the first judgment, came to RM12,849,352. Taking into account the first judgment, on 22 April 1997 the learned senior assistant registrar adjudged that the defendants do pay RM12,849,352 with interest at 8% per annum from the date of the first judgment and costs of RM225. I shall refer to the judgment of 22 April

A 1997 as the second judgment. When the draft of the second judgment was prepared, it perpetuated the error in the first judgment by stating that it was obtained on 13 November 1996 and expressing the 8% interest to be as from that date.

On 29 April 1997 the draft of the second judgment was served on the B defendants' solicitors for approval. Had the defendants' solicitors then recalled the letter of the plaintiffs' solicitors dated 21 December 1996 mentioned earlier, they would have realized that the date of the first judgment could not have been 13 November 1996 and the interest could not have run from that date but only from some date after 21 December 1996.

C On 9 June 1997 the plaintiffs, as judgment creditors, filed a bankruptcy notice against the judgment debtor, one of the defendants. The notice was based on, and was in conformity with, the second judgment. The amount claimed was the judgment sum of RM12,849,352, interest of RM585,789.56, being interest on the judgment sum at 8% per annum from D 13 November 1996 until 9 June 1997, and costs of RM225. The sums totalled RM13,435,366.56. The bankruptcy notice was served on the judgment debtor on 24 July 1997.

On 4 September 1997, the judgment debtor and the two other defendants filed an application for extension of time to apply for the setting aside of the two judgments. The reason for setting aside that they gave in E their affidavit was that the first judgment was irregular because, although on 21 December 1996 the judgment creditors' solicitors had threatened to enter judgment in default if the defence was not filed within seven days, the judgment in default had already been obtained, dated 13 November 1996. Since the second judgment was based on the first judgment, the second judgment was also irregular.

F Becoming aware from that application of the error as to the date, on 25 September 1997 the judgment creditors filed an application to amend the two judgments so as to reflect truly that the first judgment was entered on 30 December 1996 and not 13 November 1996. With the amendment, the interest would run from 30 December instead of 13 November. The G unsealed copy of the application and the affidavit in support of it were served on the judgment debtor's solicitors on 26 September 1997.

On 7 October 1997 the judgment debtor applied for the striking out of the bankruptcy notice on two grounds. One was that the very fact that there was a need to amend showed that the two judgments were irregular. The H other was that since interest was computed from 13 November 1996, when it should have been from 30 December 1996, the amount of RM585,789.56 for interest demanded in the bankruptcy notice was excessive. According to learned counsel for the judgment debtor, this application was prompted by the judgment creditors' application to amend the two judgments.

I On 20 February 1998, the learned senior assistant registrar dismissed the judgment debtor's application for the striking out of the bankruptcy notice. Hence this appeal.

On 26 February 1996, the judgment creditors' application to amend the two judgments was allowed after full argument. A

In this appeal two reasons were advanced in submission by learned counsel for the judgment debtor why the bankruptcy notice should be set aside.

The first reason is that the judgment creditors had not obtained a final judgment, as stipulated by s 3(1)(i) of the Bankruptcy Act 1967, on which to issue the bankruptcy notice, which was based on the second judgment. The reason advanced for saying that the second judgment was not a final judgment was the need to amend it on account of the erroneous date. Learned counsel for the judgment debtor relied on *Re Seah Kim Khoo George, ex p Mary Seah* [1989] 3 MLJ cxxvi and the authorities cited therein, which concerned the question of whether a judgment or order was final or interlocutory. Those authorities have no bearing on the question that arises here, which is not a question of whether the second judgment was final or interlocutory but a question of amending the judgment to correct an error. The second judgment was certainly not an interlocutory judgment. It was a final judgment because it finally disposed of the rights between the parties. In my opinion the fact that it contained an error that required it to be amended did not render it any the less a final judgment. B C D

The second reason is that the judgment notice claimed an amount of interest that exceeded the amount actually due. That is true, but proviso (ii) to s 3(2) of the Act provides that a bankruptcy notice 'shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake'. According to the proviso, the judgment debtor should have given such notice within seven days — the time allowed for payment — after 24 July 1997, the date of service of the bankruptcy notice. No such notice was given, and according to the clear words of the proviso the bankruptcy notice shall not be invalidated merely on account of the excessive interest. The judgment creditors will be applying for amendment of the amount of interest demanded in the bankruptcy notice. E F G

Learned counsel for the judgment debtor proposed that where a judgment debtor, on the date when the judgment notice was served on him, was not aware of the fact of excessive demand — as the judgment debtor in this case claims — the period of notice should run from the date when he first became aware of it. H

In my view, the clear words of the proviso do not admit of such a proposition. The effect of the proviso is to place on a judgment debtor the burden of verifying the correctness of the demand in the judgment notice in all respects within the seven days. If he does not trouble to verify it or if, even after doing his utmost, he fails to detect an excessive demand and therefore does not give the notice as to the excess within the time allowed for payment, he loses his right to have the bankruptcy notice invalidated by reason only of excessive demand. Of course, if the demand is truly I

A excessive, he is entitled to have the amount corrected so that he will not be liable for more than is due, but he is precluded from invalidating the bankruptcy notice.

Even if the proposition of learned counsel for the judgment debtor can be accepted, on the facts it avails her nothing. When she applied on
B 4 September 1997 for extension of time to apply for the setting aside of the two judgments, she had been served with the bankruptcy notice. The application of 4 September 1997 was founded on the realization that there could not have been a judgment in default entered on 13 November 1996. Yet a judgment in default had been entered, which could have been entered only after the letter of the judgment creditors dated 21 December 1996.
C From that she would have known that she had been charged excessive interest from 13 November 1996 in the bankruptcy notice. Taking her application dated 7 October 1997 for the setting aside of the bankruptcy notice to be the notice required by the proviso, that was one month after she became aware of the excessive demand on 4 September 1997, more than seven days, the time allowed for payment stipulated by the proviso.

D That the judgment debtor knew of the excessive interest on 4 September 1997 is admitted by her in para 10 of her affidavit dated 24 April 1998 where she says: 'I verily believe that it was just before 4 September 1997, that I had reason to believe that the above referred to judgments were incorrectly dated, claimed excessive interest and were
E irregular'.

I dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Zahid Taib

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